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No. 904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

FRANKLIN MCKENZIE DAVISON, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Franklin McKenzie Davison, by his counsel, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The findings of fact and opinion of the District Court (R. ii; Appellant's Appendix, pp. 1-5) are reported at F. Supp. , 7 AFTR 2d 961. The opinion of the Court of Appeals is reported at F. 2d , 9 AFTR 2d 848 and appears in the Appendix, *infra*, pp. 1a-7a.

JURISDICTION

The judgment of the Court of Appeals (App., *infra*, 8a) was entered on February 7, 1962. Petition for rehearing was filed on March 3, 1962 and was denied by order of the Court of Appeals on March 22, 1962 (App., *infra*, p. 9a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the relief provisions of the Current Tax Payment Act of 1943 by implication repealed the six-year statute of limitations provided in 1939 IRC 276(c) for collection of reported and assessed income tax liability so that more than Five Billion Dollars of assessments, plus interest, including the 1942 interest involved in this case, may be collected until the Doomsday end of time?

2. Whether the Commissioner was required by 1939 IRC 273(a) to include, and did include, all 1942 liability in jeopardy assessments which been have fully paid, plus interest?

STATUTES INVOLVED

Section 276(c) of the Internal Revenue Code of 1939 provides:

> "*Collection after assessment.*—Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six year-period. The

period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

Section 273(a) and (b) of the Internal Revenue Code of 1939 provide:

"273. *Jeopardy assessments.*—(a) *Authority for making.*—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

"(b) *Deficiency letters.*—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment."

Section 6(a) of the Current Tax Payment Act of 1943, (c. 120, 57 Stat. 126) provides (1943 Prentice-Hall Federal Tax Service, par. 18,082):

"CURRENT TAX PAYMENT ACT OF 1943—SEC. 6 RELIEF FROM DOUBLE PAYMENTS IN 1943.—

"(a) *Tax for 1942 Not Greater Than Tax for 1943.*—In case the tax imposed by Chapter 1 of the Internal Revenue Code upon any individual (other than an estate or trust and other than a nonresident alien not subject to the provisions of sections 58, 59 and 60 of such chapter) for the taxable year 1942 (determined without regard to this section, without regard to interest or additions to the tax, and without regard to credits against the tax for amounts withheld at source) is not greater

than the tax for the taxable year 1943 (similarly determined), the liability of such individual for the tax imposed by such chapter for the taxable year 1942 shall be discharged as of September 1, 1943, except that interest and additions to such tax shall be collected at the same time and in the same manner as, and as a part of, the tax under such chapter for the taxable year 1943. In such case if the tax for the taxable year 1942 (determined without regard to this section and without regard to interest or additions to the tax) is more than $50, the tax under such chapter for the taxable year 1943 shall be increased by an amount equal to 25 per centum of the tax for the taxable year 1942 (so determined) or the excess of such tax (so determined) over $50, whichever is the lesser. This subsection shall not apply in any case in which the taxpayer is convicted of any criminal offense with respect to the tax for the taxable year 1942 or in which additions to the tax for such taxable year are applicable by reason of fraud."

STATEMENT

Mr. Davison filed his Federal income tax return for 1942 on March 15, 1943. The 1942 return reported liability of $39,267.11 which was duly assessed in April 1943 in Assessment Account No. 22780 (Stip. Par. 1; R. 6-7).

Alleged fraud with respect to unreported liability was discovered in 1947, indictment was secured in 1949 and conviction was had on April 5, 1950 (Stip. Par. 6; R. 7).

After Mr. Davison had paid the fine and served the prison sentence imposed, the Commissioner advised him as to his alleged liability for 1942 through 1947 by the imposition of jeopardy assessments on November 21, 1951 followed by Final Determination (90-Day

Letter) on December 14, 1951. The jeopardy assessments and Final Determination covered "Total tax, penalties and interest" in the amount of $220,123.46 for the years 1942 through 1947 (Stip. Pars. 7, 8; R. 7-8). The Final Determination stated that the jeopardy assessments included the "Balance (Reassessed portion of 1942 tax)" in the total $220,123.46 liability which was admittedly paid in full, plus interest, for all years through 1946 (Stip. Par. 10; R. 8).

Mr. Davison has paid every penalty imposed by law for tax fraud, i.e., fine, imprisonment and all civil penalties. Further, admittedly, with respect to the reported 1942 liability, assessed in April 1943, he has paid 150% thereof designated to be such 1942 liability, as follows:

1. He made a first 25% payment of $9,816.77 on March 15, 1943 (Stip. Par. 3; R. 7).

2. He made a second 25% payment of $9,816.78 in June of 1943 (Stip. Par. 4; R. 7).

3. He made a third 25% payment of $9,816.78 by reporting on his 1943 return and paying $9,816.78 of 1942 liability against the balance of the $39,267.11 assessed against him for 1942 (Stip. Par. 5; Line 19(c) on page 4 of Mr. Davison's 1943 return; R. 7, 20).

4. In the course of settling the Commissioner's Final Determination (90-Day Letter) dated December 14, 1951, covering the years 1942 through 1947, Mr. Davison on December 31, 1952 made a fourth 25% payment of $9,816.78, plus interest, specifically stated and billed against him as constituting the "Balance (Reassessed portion of 1942 tax)" (Stip. Pars. 9, 12; R. 8, 9).

5. In December of 1953 Mr. Davison made a fifth payment of 50% of 1942 liability in the amount of $19,633.56, plus interest (Stip. Par. 14; R. 9).

In disregard of the original assessment of April 1943 and the reassessment in the jeopardy assessments of 1951, after the time within which Mr. Davison could appeal to the Tax Court had expired, the Commissioner proceeded to make a further reassessment on May 2, 1952 equal to 50% of the previously reported 1942 liability which had been assessed in 1943 and again reassessed in 1951. Despite the fact that all three of these assessments were paid, the Government, nevertheless, instituted an action on May 1, 1958 to collect another 50% of the 1942 reported and assessed liability in the amount of $19,633.56. When Mr. Davison was able to demonstrate that on any theory all three assessments for 1942 had been paid, the Government abandoned its original action for 1942 principal liability but still sought to collect interest on 50% thereof and has been sustained by the Court below (Stip. Par. 14; R. 9).

The grounds upon which Mr. Davison refused to make further payments of 1942 liability after having already made a 50% overpayment with respect thereto are, *first*, that 1942 liability has been overpaid, *second*, that even if it had not been paid its collection was clearly barred by the six-year statute of limitations provided in 1939 IRC 276(c) when this action was commenced *more than 15 years after the assessment* of April 1943 and, *third*, that in any event all known legally collectible liability was mandatorily required by 1939 IRC 273(a) to be included in the jeopardy assessment.

In deciding against Mr. Davison the Court of Appeals has grounded its decision on the opinion in the companion *Hardy* case. Thus, the Court has made three basic errors, as follows:

1. It has been held that although admittedly Mr. Davison has paid 150% of the 1942 liability as designated by the Commissioner, the payment pursuant to the jeopardy assessment and Final Determination did not count because, allegedly, the 1942 liability paid thereunder was "erroneously labeled" and should have been considered to be 1943 liability. This conclusion is demonstrably wrong because had this been 1943 liability there would have been a substantial overassessment for that year and, of course, no fraud penalty could have been imposed. Further, the inclusion in the jeopardy assessment or collection of any such 1943 liability would have been in direct violation of 1939 IRC 3746(c).

2. In reaching its conclusion that "a jeopardy assessment does not purport to be a final statement of a balance due the Government" the Court overlooked the sole authority for jeopardy assessments contained in 1939 IRC 273(a). That section mandatorily requires that in the case of jeopardy assessments the Commissioner "shall immediately assess" all deficiency, all interest, all additional amounts, and all additions to the tax. Clearly, the Commissioner is not authorized to omit alleged liability and make a further assessment with respect thereto after the time to appeal to the Tax Court has expired. The Court mentioned only 1939 IRC 273(c) which deals with a situation not existing in this case, namely, the imposition of a jeopardy assessment after a deficiency notice has been sent. Even in such a situation the Commissioner

is required to include all known liability in the jeopardy assessment regardless of the amount that may have been included in the deficiency notice. See 1939 IRC 273(c) and Regulations 111, Section 29.273-1.

3. The most serious and far reaching error is the Court of Appeals' holding, in direct conflict with decisions of the Supreme Court, that the relief provisions of the Current Tax Payment Act of 1943 repealed by implication the six-year statute of limitations of 1939 IRC 276(c) and thereby authorized the collection of more than Five Billion Dollars of reported and assessed tax, plus interest, until the Doomsday end of time without any limitation thereon whatsoever. This error of major magnitude has been made despite the fact that the Court of Appeals found that Congress did not "deal with the problem here presented" and that if "the Act and Section 276(c) are read together and interpreted literally" it "would follow from a strict construction of the statutes" that the Current Tax Payment Act of 1943 did not repeal the six-year statute of limitations provided in 1939 IRC 276(c). Nevertheless, the Court of Appeals held that the relief provisions of the Current Tax Payment Act of 1943 apply only for the purpose of repealing by implication the six-year statute of limitations.

Under the Current Tax Payment Act of 1943 Five Billion, Seven Hundred Forty-One Million, Two Hundred Eighty Two Thousand ($5,741,282,000.00) Dollars of reported and *assessed* income tax liability was not collected. See *United States Treasury Department, Statistics of Income for 1943, Part 1 (1950 Edition)*, pages 47-51. The Court of Appeals has held that the statute of limitations on collection of these assessments, plus interest, is removed forever.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals has held that although the Current Tax Payment Act of 1943 did not deal with the statute of limitations it, nevertheless, by implication repealed the six-year statute of limitations for collection of assessed tax so that more than Five Billion Dollars of assessments, plus interest, may be collected at any time. This holding is in direct conflict with decisions of the Supreme Court and a more important problem has never arisen under the Internal Revenue Code.

In *Rothensies* v. *Electric Storage Battery Co.*, 392 U.S. 296, 91 L. Ed. 296, 329 U.S. 296, 35 AFTR 297 (1946) this Court stated that it "would be all but intolerable" to "have an income tax system" without a statute of limitations to prevent controversies "for ever and a day."

In *United States* v. *Updike*, 281 U.S. 489, 74 L. Ed. 984, 8 AFTR 10916 (1930) the Court held that even in a case where no return was filed, once an "actual assessment" is made the six-year statute of limitations must apply. The Court stated that "to allow an indefinite time" for collection "would be out of harmony with the obvious policy of the act" and explained:

> "* * * Where, in a 'no return' case, an assessment which, under paragraph (a) may be made at any time, has in fact been made, a proceeding to collect must be begun within six years thereafter; * * * In such case to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought."

The decision below is in direct conflict with the position always taken by this Court as enunciated in *United States* v. *Updike, supra,* and *Rothensies* v. *Electric Storage Battery Co., supra.*

It should be noted that there can never be fraud with respect to reported and assessed liability. Moreover, fraud has no bearing upon the six-year limitation for collection of *assessed* liability. Mertens, *Law of Federal Income Taxation,* Section 57.79, succinctly states the rule enunciated by the Supreme Court, as follows:

> "* * * * This six-year period is exclusive. Where assessment has been made it supersedes the unlimited period for collection even in the case of a fraudulent return. After the making of a valid assessment the Government must bring an action for collection within six years. * * *"

The Court of Appeals found that the Current Tax Payment Act of 1943 did not "deal with the problem presented" here as to the statute of limitations. Nevertheless, the Court held that the statute of limitations was repealed by implication. This, again, is in direct conflict with the decisions of the Supreme Court. The controlling principle is stated by this Court as follows:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizens." Gould v. Gould, 245 U.S. 151, 62 L. Ed. 211, 38 S. Ct. 53.

The Court of Appeals went even further and held that although the Current Tax Payment Act of 1943

was a relief provision it, nevertheless, should be construed to the taxpayer's detriment. It has long been established that a relief provision can never be construed to impose an additional burden on taxpayers or to deprive them of protection already afforded by existing law. *Bowcit Teller & Co.* v. *United States*, 283 U.S. 258, 75 L. Ed. 1018, 9 AFTR 1421; *Helvering* v. *Bliss*, 293 U.S. 144, 79 L. Ed. 246, 14 AFTR 668; *Colson Corporation*, 5 T.C. 1035, 1040; *Carter Mullaly et al., Trustees*, 5 T.C. 1379; *Fain Drilling Co.*, 8 T.C. 1174, 1176-1177; and Section 3.09, Mertens, *Law of Federal Income Taxation*.

The Court of Appeals' erroneous holding that the Current Tax Payment Act did remove the statute of limitations until the end of time on more than Five Billion Dollars of reported and assessed liability is the clearest sort of judicial legislation in direct disregard of the Supreme Court's admonition that such legislation by the courts is not proper. See Mertens, *Law of Federal Income Taxation*, Section 3.05 and the authorities there collated. This Court holds that the courts must "avoid usurpation of" legislative power and points out that the Judiciary must not legislate when "the remedy lies with the lawmaking authority, and not with the court." *Crooks* v. *Harrelson*, 282 U.S. 55, 60, 75 L. Ed. 156, 51 S. Ct. 49.

The judicial legislation in the instant case is doubly erroneous because (1) under the Supreme Court opinions the Court of Appeals is not authorized to enact such legislation and (2) it is self-evident that if Congress had been requested to repeal the statute of limitations on more than Five Billion Dollars of reported and assessed liability the request would have been sum-

marily rejected. See *Rothensies* v. *Electric Storage Battery Co., supra,* and *United States* v. *Updike, supra.*

The Court below ignored *Curd* v. *United States,* 1 AFTR 2d 678 (D.C. S.D. Fla., 1957) in which an injunction was granted against collecting 1942 liability more than six years after the original assessment. The situation in *Curd* was identical to that in the instant case except (1) the taxpayer sought an injunction and (2) the 1942 liability had not been overpaid. The Fifth Circuit held that the statute of limitations issue should be raised as a defense on the merits, as it was done in this case, rather than in a suit for injunctive relief. *Curd* v. *United States,* 257 F. 2d 347, 2 AFTR 2d. 5111 (CA 5, 1958).

In direct disregard and violation of this Court's clearest possible holdings to the contrary, the Court of Appeals has wrongly decided the instant case by holding (1) that the Current Tax Payment Act of 1943 by implication repealed the six-year statute of limitations when admittedly it did not deal with the statute of limitations at all, (2) that a relief provision must be construed to inflict injury on a taxpayer to whom by its express terms it "shall not apply", and (3) that the Court of Appeals is entitled to enact legislation which concededly the Congress did not consider or pass upon. *Gould* v. *Gould, supra, Rothensies* v. *Electric Storage Battery Co., supra, United States* v. *Updike, supra, Bonwit Teller & Co.* v. *United States, supra, Helvering* v. *Bliss, supra,* and *Crooks* v. *Harrelson, supra.* Such direct holdings in disregard of the authority of this Court can lead only to chaos with respect to more than Five Billion Dollars of reported and assessed liability for the years 1942 and 1943 if not decisively dealt with by the Supreme Court.

2. Even though the fully paid jeopardy assessments specifically included the full balance of the 1942 liability involved, as stated in writing by the Commissioner, the Court of Appeals has held that payment did not constitute satisfaction because the liability was "erroneously labeled," and proceeded to establish a wholly new rule of law to this effect: "A jeopardy assessment does not purport to be a final statement of a balance due to the Government."

1939 IRC 273(a) is the sole authority for jeopardy assessments and mandatorily requires that all known liability shall be included when such an assessment is made. The explicit requirement of 273(a) is as follows:

> "(a) Authority for Making.—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof."

Regulations 111, Sec. 29.273-1 confirm the fact that under Section 273(a) the Commissioner "is required to assess" all known liability when a jeopardy assessment is imposed.

The Court of Appeals overlooked and did not mention 273(a) and misread 1939 IRC 273(c) and thereby reached its erroneous conclusion contrary to the mandatory requirements for the imposition of jeopardy assessments. Section 273(c) deals only with a situation that does not exist in this case, namely, the imposition of a jeopardy assessment after a deficiency notice has been sent. Even in such a situation the Commis-

sioner is required to include all known liability in the jeopardy assessment regardless of the amount that may have been included in the deficiency notice. See 1939 IRC 273(c) and Regulations 111, Sec. 29.273-1.

The jeopardy assessment is the most drastic power accorded to the Commissioner by the Congress. It has been correctly described as a strangle hold over the taxpayer's assets, having the most serious consequences, in Mertens, *Law of Federal Income Taxation*, Section 49.144, as follows:

> "* * * There is little doubt but what a jeopardy assessment is a statutory label for the sovereign's strangle hold on a taxpayer's assets."

It is obvious why 1939 IRC 273(a) requires that all known liability must be included when resort is had to jeopardy assessments. The holding below that this drastic remedy may be applied piecemeal is directly contrary to the express provisions of 273(a) and in violation of every principle of fair administration of our tax laws. Consequently, it is of importance that this Court strike down such a wholly erroneous rule of law which has never heretofore been enunciated in any case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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